

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 18 of 2013

**BETWEEN:** **KIDNEY FOUNDATION OF FIJI**

**APPELLANT**

**AND:** **REUBINA RAM**

**RESPONDENT**

Appearances: Ms. M. Rakai for the Appellant.

Mr. N. Tofinga for the Respondent.

Date/Place of Judgment: Tuesday 8 September 2015 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

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**JUDGMENT**

**Catchwords:**

**Employment Law – Appeal – Summary Dismissal - unlawful dismissal - unfair dismissal - fixing remedies: factors to be considered in the three instances identified, i.e., unlawful/unfair dismissal and remedies.**

**Legislation:**

1. **The Employment Relations Promulgation 2007 (“ERP”): ss. 33; 34; 230 (1) (b).**

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**Cause/Background**

1. The employee filed an employment grievance that she was unlawfully and unfairly dismissed by the employer on 7 December 2010.

2. The Employment Relations Tribunal (“ERT”) found that the employer’s decision to summarily dismiss the employee was unlawful and unfair and awarded remedies of 8 months lost wages (pegged at \$25,000 per annum).
3. Aggrieved at the decision, the employer appealed and raised 8 grounds of appeal out of which one being the first ground of appeal was withdrawn at the hearing.
4. The grounds of appeal are thus that the ERT erred in law and in fact:
  1. *[Withdrawn]*.
  2. *In holding that the employer had failed to give the employee due process when there was no obligation on the employer to do so where gross misconduct is committed by the employee.*
  3. *In holding that the employee earned \$25,000 when her own evidence only shows that she earned \$15,000 and to include other benefits into these wages were wrong in law and fact when there was no evidence of this available to the Tribunal to make such a finding.*
  4. *When it failed to take into account that the employee had been found guilty of four allegations of gross misconduct which led to her receiving the summary dismissal letter dated 7 December 2010.*
  5. *In not taking into account the evidence of the employer’s one witness Mr. Dewan Maharaj on the matter in which summary dismissal letter was given to the employee and who gave unequivocal evidence that the employee committed gross misconduct which justified summary dismissal.*
  6. *In taking into account that apart from the four allegations of misconduct against the employee there was also an admission by her that she had unilaterally changed the prices of treatment which is the primary service of the appellant.*
  7. *In holding that the employer was not fair to the employee when the appellant exercised its discretion under section 33 of the ERP to dismiss her on the grounds of gross misconduct.*

**8. In granting compensation in terms of eight month's salary which is contrary to law.**

5. In arriving at the decision that the employee was unlawfully terminated the ERT found that the reasons that the employer advanced for terminating the employee was that the employee had acted contrary to the policies of the employer and that she had been cited for gross misconduct at several instances. The ERT found that none of the allegations against the employee was established and as such the cause(s) for which she was dismissed was not made out by the employer.
6. In finding whether the dismissal was fair, the ERT found that it was not in that she was denied the right to due process such as not being accorded a proper investigation, followed by her right to be heard before she was considered for the penalty of summary dismissal. It was found that denial of her this right would have caused her emotional and psychological distress and shock at the way she was given the penalty.
7. The ERT also found that it would be humiliating to be treated in that way when she had a blemish free record and the police investigation on the missing money had not come to an end or finalized before she was dismissed from employment.

**Submissions**

8. In respect of grounds 2, 5, 7 and 8, Ms. Rakai argued that the ERT failed to analyse what rights an employer has when it comes to dealing with situations of gross misconduct.
9. The employee was found guilty of gross misconduct by the employer for:
  - *by passing the Board by seeking to increase salary by 40%.*
  - *failing to pay the staff their meal allowance of \$237 despite being told to do so.*
  - *unilaterally changing the prices of dialysis treatment without prior authority.*
10. In her cross- examination, the employee had admitted to reducing the price of dialysis treatment using her discretion and social justice for an overseas client and not paying out staff despite

doing banking on a daily basis. This establishes her guilt and misconduct based on which she was terminated.

11. Ms. Rakai argued that the summary dismissal letter does not comply with the requirements stipulated in s. 33(2) of the ERP in that no reasons were stipulated as to why she was being terminated but prior to the issuance of the letter of dismissal, the pending issue was the missing \$237 and so it was obvious why she was being terminated. There was no prejudice caused to the employee as a result of the omission in the letter why she was being terminated.
12. On ground 3, Ms. Rakai submitted that the actions of the employer were consistent with the provisions of s. 33(1) of the ERP. There was no need under s. 33(1) to grant the employee due process. The ERT erred when it stated that due process ought to have been given.
13. Under ground 4, it was submitted that the employee had given evidence to the effect that she earned \$15,000 per annum. By including other benefits in the wages, the ERT fell in error of law and fact. There was also contradictory evidence that was submitted by the employee. She had submitted a pay slip which stated that she earned \$10, 588.10. The proper wages of the employee was \$10,000 with a fringe benefit of a motor car for about \$15,000. The sum of \$25,000 should not have been used as a starting point but the sum of \$10,000 ought to have been used as that was her proper wages per annum.
14. On ground 6, it was submitted that the ERT erred in law and in fact in not taking into account the evidence of the employer on why the employee was dismissed on the grounds that she failed to obey lawful orders to pay the staff their meal and transport allowance.
15. On ground 9 Ms. Rakai submitted that the employee had only worked for 2 years and 4 months and any award should have been limited to three months as it used to be done in cases before.
16. Mr. Tofinga replied that in this case, it was correctly found that the dismissal did not follow the procedure laid down by the law. Since no specific reason for terminating the employee was given, the employer at the trial attempted to adduce many reasons for the dismissal but as the ERT observed after those alleged misconduct the employee was still kept at work.

17. It was prejudicial to the employee to be told at the trial the reasons for being terminated but if these reasons were so valid the summary dismissal ought to have occurred at the time those acts took place but nothing such as that happened. The employee continued to occupy the position with a pay rise and this negates all the prior claims for unlawful dismissal.
18. The only prevalent matter at the time of dismissal was the issue of not paying the staff and that is because the money was missing from the drawer. There was no evidence to suggest that the employee had stolen the money and in absence of such evidence the cause was not established. Even the police investigation remained incomplete and the employee was terminated.
19. Once the cause to terminate is not established, the termination is unlawful. The employee was also treated unfairly because she was not given the chance to explain her position or the due process and that aspect to an employee of her standing was humiliating.
20. The ERT was correct in making the award under s. 230 of the ERP and in particular s. 230(b) and (c) (ii) which allows for compensation of lost wages and benefits. The law that stood prior to the ERP coming in force in 2008 does not apply as a result.

### **Law and Analysis**

21. It is undisputed that this was a case for summary dismissal under s. 33 (1) of the ERP. S. 33 of the ERP empowers an employer to terminate employment without notice for various reasons amongst which one reason is if the worker is guilty of gross misconduct.
22. The procedure on how to carry out summary dismissal is carefully laid down in ss. 33(2) and 34 of the ERP.
23. S. 33 (2) states that the *“employer must, provide the worker with reasons, in writing, for the summary dismissal at the time he or she is dismissed”*.
24. S. 34 requires that *“if a worker is summarily dismissed for lawful cause, the worker must be paid on dismissal the wages due up to the time of the worker’s dismissal”*.

25. The termination letter of 7 December 2010 reads:

***“This is to advise you that your services are no longer required effective as of today. Please find a cheque containing the amount for 1 month advance pay, 1 week annual leave pay and 1 week’s wages”.***

26. The letter above itself indicates a breach of s. 33(2). It does not stipulate why the employee was terminated. It is obvious that at the trial the employee was being accused of many instances of misconduct but she was continued at the employment which means that those actions of the employee whether it constituted a misconduct or not was not taken seriously by the employer. If it was, the employee would have been terminated immediately when the alleged misconduct occurred. The employer would not have waited until 7 December 2010 to terminate her.

27. The only issue that was pressing at the time of the dismissal was the issue of the missing cash of \$237 which money was supposed to be paid to the employees for meal and transport allowance.

28. The reason why the employees were not paid was that the cash had gone missing from the drawer in which the respondent employee had kept the money. The employer was not able to establish that this employee was responsible for stealing the money. In fact the office was left in charge of this employee and another person who understudied Mrs. Ram.

29. Definitely the money went missing and there was no evidence to direct that a theft occurred at the hands of this employee.

30. The cause therefore that was impending at the time of the dismissal was not established by the employer. Not only that, but, the procedure to terminate her was not correct under s. 33(2).

31. Ms. Rakai wants me to accept that by not giving notice to the employee, there was no prejudice because the issue of missing money was alive and the employee could have made out why she was being dismissed.

32. Ms. Rakai contradicts her own submission when she asks me to analyse the misconduct of the employee based on which she was terminated and her misconduct is not only alleged to be the

missing money and the non-payment of the staff as a result but also various other allegations which occurred prior to this incident for which the employer took no serious action against the employee.

33. How then was the employee not prejudiced? If she believed that she was being dismissed on the prevalent incident, she would be mistaken because she is being alleged against other misconduct as well.
34. In any event, the right to written reasons is a statutory right and that cannot be overcome by a clumsy argument such as knowledge of the incident. That omission makes the termination procedurally incorrect which leads to unlawful termination.
35. On my own assessment, there is no evidence on the balance of probability to either establish the cause for the misconduct or the lawful procedure that led to the dismissal.
36. In that regard I find that the ERT was correct in finding that the termination was unlawful.
37. The next issue is the effect of not following the due process as mandated by s. 33(1) of the ERP. The ERT held that since the employee was not given due process, that was humiliating to the employee, and award of 8 months' salary which has a component for remedy for humiliation, loss of dignity, and injury to the feelings of the worker.
38. What is the exact component of that remedy is not apparent from the judgment. S. 230 states the remedies that can be awarded and remedy for humiliation, loss of dignity, and injury to feelings is a separate head of remedy. Since this head of remedy is normally granted when the fairness of the termination is considered, the ERT should have identified what is the actual award under this head.
39. The question of whether or not the procedure to dismiss an employee summarily was followed or not is one that goes to the root of the lawfulness of the dismissal and not the fairness of the same. The question of whether the proper procedure was followed or not was not material in deciding the fairness of the dismissal. It is the manner in which the employee was treated in carrying out the dismissal that must be looked at when determining the issue of fairness.

40. The ERT fell in error of law when it stated that the employee was not given the due process to be heard and therefore it was humiliating to her when she was dismissed.
41. It is now for me to deduct the appropriate amount from the award to reflect a proper award for unlawful dismissal only as the unfair dismissal was not established on evidence. The remedies must be based on certain factors like (*the list is not exhaustive*):
- *when was the employee dismissed;*
  - *when did the trial take place;*
  - *why did it take so long for the trial to take place;*
  - *is the employer to be blamed for the delay in the trial;*
  - *was the employee employed between the period of dismissal and the trial.*
  - *what were the earnings of the employee between the period of dismissal and trial.*
  - *why did not the employee find any employment and mitigate his loss.*
  - *if attempts were made for an employment, is the employer to be blamed for the non-employment due to its conduct.*
42. No such matter was established to fix a quantum for lost wages and salaries. If any evidence was adduced to the effect I have identified above, at least I would have been in a position to fix a proper quantum but my hands are tied with the limited information.
43. What I can gather from the judgment is that the employer had not prudently proceeded to trial on time and on many occasions; the matter had to be adjourned at its instance. The employee was out of employment until the trial took place and the delay in the trial was caused by the employer.
44. In absence of any evidence and justification by the ERT on how the remedy was arrived at, I find that at least 5 months' salary is appropriate in the circumstances in which period the employee was reasonably expected to find an employment if she wanted with her experience.
45. I find that at least 3 months must be reduced from the award as none should have been made for compensation for humiliation, loss of dignity and injury to feelings.



46. The proper amount that must remain is an amount of 5 months wages. What should be the annual salary that must be used? The undisputed evidence was that the employee received \$25,000 worth of salaries and benefit per year so it was not wrong for the ERT to use that figure to arrive at the result: *s. 230 (1) (b)*.

**Final Orders**

47. The appeal is allowed on the ground that the ERT was wrong is law in arriving at a finding that due to lack of due process being granted to the employee the dismissal was unfair.

48. I therefore set aside the award of 8 months wages lost as a result of the grievance and substitute it with 5 months wages tagged at annual salary of \$25,000.

49. Each party to bear their own cost of the appeal proceedings.



  
Anjala Wati

Judge

8.09.2015

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To:

1. Ms. M. Raka for the Appellant.
2. Mr. N. Tofinga for the Respondent.
3. File: Suva ERCA 18 of 2013.